

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

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74-1693

In The
United States Court of Appeals
For The Second Circuit

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

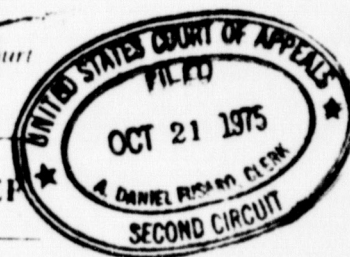
vs.

HILNEY & COMPANY, FREDERICK HILNEY,

Defendants-Appellants.

*On Appeal from Judgment of the United States District Court
for the Southern District of New York*

ANSWER TO APPELLANTS' REPLY BRIEF



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1693
No. 74-1704

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

-against-

TILNEY & COMPANY and FREDERICK TILNEY,

Defendants-Appellants,

I. ALAN HARRIS,
Withdrawn Receiver-Appellant
(Cross-Appellant) and

JOSEPH C. HOGAN,

Appellees.

On Appeal from the United States District Court for
the Southern District of New York

ANSWERING BRIEF FOR RECEIVER-APPELLEE JOSEPH C. HOGAN

At the conclusion of the argument of this appeal on October 15, 1975, counsel for defendants-appellants moved the Court for permission to file a reply brief. Counsel for receiver-appellee Hogan objected, on the grounds that

said brief was not served and said motion was not made within the time periods prescribed in Rule 31(a) of the Federal Rules of Appellate Procedure and Rule 8 of the Civil Appeals Management Plan of the United States Court of Appeals for the Second Circuit. It was pointed out to the Court that the reply brief was served on Mr. Hogan's attorneys, by mail, on Friday, October 10, 1975, approximately 9 months after service of appellees' briefs, and approximately 4 months after the filing of the deferred joint appendix. This Court decided to accept the reply brief for filing, but also granted appellees until October 21, 1975, to serve and file answering briefs in response to said reply brief.

THE REPLY BRIEF

The reply brief, like defendants-appellants' principal brief, is replete with distortions of fact, negative pregnant and other deceptive devices. Since time will not permit the detailed treatment of every such impropriety, and moreover, since a supplemental appendix is not to be filed, this answering brief shall respond only to several of the more serious allegations made in the reply brief. As had been stated in connection with defendants-appellants' principal brief, however, the Court is urged to carefully scrutinize the entire reply brief in the light of the record of

the District Court. It is also suggested that the Court carefully review the pertinent parts of the earlier Hogan brief in conjunction with the statements made in the reply brief. If these examinations are made, the fallacious positions taken in the reply brief should be self-evident.

Assets "Lost" During the Course of the Appeal

The reply brief charges that receiver Hogan allowed tax liens to accumulate on certain real property and insinuates that Mr. Hogan caused \$300,000.00 in real property to be lost to the estate during the course of the appeal.

Although these statements are extraneous to the record before this Court, they have been introduced by defendants-appellants, and receiver Hogan should be afforded an opportunity to respond thereto. The facts, as supported by motion papers submitted to this Court and by the records of the Supreme Court, State of New York, Nassau County, are as follows:

The Tax Liens -

In his motion dated August 1, 1974 (see page 4, Hogan brief), receiver Hogan advised this Court of the tax lien situation and pointed out that since he had virtually no cash or liquid assets, further liquidation would be necessary in the event Mr. Tilney did not file the bond

(and satisfy the small judgment) which would permit the release of assets. Mr. Hogan's concern was indeed justified, since during the following months the Treasurer of Nassau County issued tax deeds to tax lienholders resulting in the ostensible loss of certain parcels of real property to the receivership estate. It should be pointed out that in addition to the abovementioned motion, receiver Hogan attempted to borrow funds, without success, and, as a last ditch effort, moved to stay the Treasurer of Nassau County from issuing the deeds. This motion was denied by Justice Suozzi of the Supreme Court Nassau County (Special Term Part II) on March 3, 1975. Receiver's counsel has offered to move to set the deeds aside, but Mr. Tilney has insisted the parcels are beyond recovery. Receiver Hogan believes the real property is still available to the estate because:

1. A suit to set aside the deeds may be successful on the grounds the property was in custodia legis.
2. The Nassau County Administrative Code provides certain further redemption rights in the event a suit to confirm title is instituted (which would be a practical necessity should the property be developed).

3. The property is believed to be held by Tilney confederates in order to render Tilney judgment-proof in the face of an anticipated claim of several hundred thousand dollars by the Marine Midland Tinker National Bank. (See: Letter of William M. Johnson, Esq., attached to defendants-appellants' motion papers dated July 25, 1974, which indicates that the Tilneys were asked for a mortgage of \$720,000.00. See Also: Paragraph 7 of Hogan Affidavit of July 31, 1974, with Notice of Motion dated August 1, 1974.)

The Martinez Judgment -

The Tilneys concealed a creditor's lawsuit, subsequent default judgment and execution thereon, until, literally, the eve of the sheriff's sale of certain real property owned by Frederick Tilney and his wife on Seawanhaka Road, Centre Island, New York. Mr. Tilney indicated that his attorneys were handling the matter and that the sale would be postponed. Two hours before the scheduled sale (May 5, 1975), receiver's counsel was advised by Tilney's attorneys that the judgment

creditor's attorney would not postpone the sale. Receiver's counsel immediately proceeded to Mineola, New York, and put all prospective bidders on actual notice of the receiver's interest in the property. The property was then bid in by the judgment creditor's attorney for the amount of the judgment (\$7,076.83). Receiver's counsel was then forced to resort to further litigation to set aside the sale and the parties are currently awaiting a decision by Justice Albert of the Supreme Court, Nassau County (Martinez v. Tilney; Index No. 13671/1974).

The Condition of the Tilney & Company Records
at the Commencement of the Receivership

It is hard to believe that defendants-appellants seriously contend that the records of Tilney & Company were not in disorder at the inception of the receivership. In addition to the findings of the receivers and the accountants to the receivers (DJA 69), the Securities and Exchange Commission was of the same opinion (DJA 19), and Tilney & Company's own accountants, Louis D. Blum & Co., had to be called in to bring the firm's books up to the date of December 17, 1967. (The Blum firm was paid administrative allowances of \$6,825.00 for its services to the estate (DJA 1204)).

The quotes attributed to Mr. Hogan on page 3 of the reply brief have been taken out of context. Mr. Hogan was

advising the Court that the confirmation records and other records should be checked against the stock record book, which appeared to be "pretty accurate".

Overdrafts

Defendants-appellants have resorted to some fancy footwork in attempting to show that overdrafts and bouncing checks did not play a significant role in the demise of Tilney & Company. However, complaints of customers about checks which were not paid because of insufficient funds were part of the basis for the Securities and Exchange Commission's investigation which led to the creation of the receivership (DJA 21). Moreover, the Tinker National Bank claim was for a note given by the Tilneys by reason of a Tilney & Company overdraft (DJA 405).

Asset Valuation; Accountants' Reports

The many reports prepared by the accountants to the receivers were, as is the practice in such matters, submitted for the guidance of the receivers for purposes of liquidation (and also for purposes of the preparation of fiduciary income tax returns), not for purposes of making settlement with creditors, or obtaining credit, or for other such reasons. All reports were qualified as to the scope and nature of the

examination and the bases of the assigned valuations were given in detail. As stated in the Accountants' Certificate of July 19, 1968 "...the Exhibits and Supporting Schedules listed in the index should be read in conjunction with the footnotes to the financial statements." (DJA 69). The footnotes themselves are significant and should be reviewed by the Court (DJA 70-80). Also, for example, see Accountants' Certificate of December 21, 1972 (last two paragraphs). (DJA 1205).

The Tilney financial reports, however, were not prepared and attested to by his certified public accountants, but were obviously prepared by Frederick Tilney to show defendants-appellants' position in the most favorable light. The District Court was well aware of Mr. Tilney's unfair extrapolations and his distortions as to valuation and presentation and this Court is respectfully cautioned to guard against being taken in by the Tilney financials. Although the Tilney reports will not stand up under close scrutiny, their sheer volume may tend to confuse and obscure the issues.

The Surcharge Claims

The reply brief refers again to several of the claimed items of surcharge. Rather than specifically respond to these items, this brief will reiterate Mr. Hogan's position

in connection with the surcharge claims:

As pointed out in the earlier Hogan brief (page 37), the surcharge claims were before the lower court in the form of two surcharge affidavits, which were responded to on the record. At the time of the hearing of the account, both Frederick Tilney and his counsel stated they had no objection to the account, but attempted to obtain permission for Mr. Tilney to proceed pro se on the surcharge claims. The items of surcharge, then, were not specifically interposed as objections to the account and what the District Court was essentially called upon to determine was:

1. Whether the account (to which there was no objection) should be approved; and
2. whether the application to proceed pro se on the surcharge claims should be allowed.

The court, in deciding the pro se application, found that it was necessary to examine the surcharge allegations themselves (DJA 1339), and held that each of the claims had either been considered by the court previously or was, on its face, void of legal substance. (DJA 1339-1343). Thus, even though the surcharge claims were improperly interposed, they were considered by the court and rejected. For Mr. Tilney to claim he has not had his day in court on these claims is preposterous.

In addition to the surcharge affidavits and affidavits in response thereto, the court heard an enormous amount of argument and testimony in conducting scores of hearings over 6 1/2 years, and was certainly justified in finding such claims to be thoroughly lacking in merit.

CONCLUSION

All judgments, orders and rulings of the District Court should be affirmed, insofar as they apply to receiver-appellee Joseph C. Hogan, to Wagner, Quillinan & Tennant, attorneys for the receivers, and to Hertz, Herson & Co., accountants for the receivers; and this Court should award the costs and expenses of this appeal, including counsel fees, to said receiver-appellee.

Respectfully submitted,

WAGNER, QUILLINAN & TENNANT

Attorneys for Receiver-Appellee
Joseph C. Hogan

Of Counsel:

Robert F. Mulligan

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SECURITIES AND EXCHANGE COMM.,

Plaintiff-Appellee,

- against -

TILNEY & COMPANY, et ano.,

Defendants-Appellants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

NEW YORK

ss.:

I, James A. Steele

being duly sworn,

depose and say that deponent is not a party to the action, is over 18 years of age and resides at
310 W. 146th St., New York, N.Y.

That on the 21st day of October 19 75 at 1) Securities & Exchange Comm.
26 Federal Plaza, N.Y., N.Y.
2) Saxe Bacon & Bolan P.C.
39 East 68th St, N.Y., N.Y. upon
3) Bernstein Hawkins & Katcher
110 East 59th Street, N.Y., N.Y.

deponent served the annexed Brief

the Attorneys in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 21st
day of October 19 75

Robert T. Brin

James A. Steele
JAMES A. STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1972